79-981

No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN N. MITCHELL, PETITIONER

v.

BERTRAM ZWEIBON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement	4
Reasons for granting the petition	10
Conclusion	11

CITATIONS

Cases:

Chevron Oil Co. v. *Huson*, 404 U.S. 97	7
United States v. *United States District Court*, 407 U.S. 297	2, 6, 10
Wood v. *Strickland*, 420 U.S. 308	7
Zweibon v. *Mitchell ("Zweibon I")*, 516 F.2d 594	6-7, 8

Constitution, statutes and regulations:

United States Constitution, Fourth Amendment	2-3, 4, 8, 9
Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 *et seq.*	6
Section 102(a), 92 Stat. 1786	6
Section 104(a), 92 Stat. 1788-1789	6
Section 201(c), 92 Stat. 1797	3, 7

Constitution, statutes and regulations—Continued — Page

Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. 2510 *et seq.* 4

18 U.S.C. 2511(3) 3-4
18 U.S.C. 2520 7

42 U.S.C. 1983 4
42 U.S.C. 1985 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of John N. Mitchell, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-22a) is not yet reported. The opinion of the district court (App. C, *infra*, 25a-36a) is reported at 444 F. Supp. 1296.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 23a-24a) was entered on July 12, 1979. On

October 20, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Attorney General is absolutely immune from personal damages liability for acting on behalf of the President to authorize electronic surveillance for national security purposes.

2. Whether the Attorney General is entitled to a qualified immunity as a matter of law for authorizing a warrantless electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972).

3. Whether this Court's decision in *United States* v. *United States District Court*, and lower court rulings amplifying that decision, should be applied retroactively to create a personal damages liability for federal officers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. 2511(3)[1] provided in pertinent part:

> (3) Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be other-

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[1] 18 U.S.C. 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797. This statute which est,ablishes procedures for the conduct of electronic surveillance for national security purposes, was enacted nine years after the events that gave rise to this litigation.

wise used or disclosed except as is necessary to implement that power.

STATEMENT

1. Respondents (16 members of the Jewish Defense League (JDL)) instituted this action on October 7, 1971, in the United States District Court for the District of Columbia against the then Attorney General of the United States, petitioner John N. Mitchell, and nine Special Agents of the Federal Bureau of Investigation. The suit followed disclosure by the government in two consolidated criminal cases that conversations of certain defendants and counsel had been overheard during an electronic surveillance of telephones in the JDL offices in New York City.[2] The electronic surveillance was conducted from October 1, 1970, through October 31, 1970, and again from January 5, 1971, through June 30, 1971. The surveillance had been authorized by Attorney General Mitchell, acting pursuant to the President's authority to conduct surveillance for national security purposes. The plaintiffs sought money damages, claiming that the surveillance violated the Fourth Amendment, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, and 42 U.S.C. 1983 and 1985.

On cross-motions for summary judgment based on affidavits and exhibits, the district court entered judgment for the defendants. 363 F. Supp. 936 (1973).

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[2] *United States* v. *Bieber, et al.*, 71 CR 479 (E.D. N.Y.), and *United States* v. *Joffee, et al.*, 71 CR 480 (E.D. N.Y.).

The district court found that the Attorney General had authorized the surveillances only after determining that "the activities of the JDL were obviously detrimental to the continued peaceful relations between the United States and the Soviet Union and threatened the President's ability and contstitutional authority to conduct the foreign relations of this country." 363 F. Supp. at 942. The court noted that petitioner had not acted in a vacuum in authorizing the surveillances, but had "relied on the total knowledge received from the Department of State, and the National Security Council and from meetings with the Director of the FBI." *Id.* at 939. Moreover, the court found that numerous factors had influenced the Attorney General's judgment, such as the possibility of attacks on foreign dignitaries by the JDL during the 25th session of the General Assembly of the United Nations in October 1970, protests by the Soviet Union and its thinly-veiled threats of possible retaliation against United States diplomats and embassy personnel in Moscow, and the unfavorable consequences the JDL's activities could have on continued cooperation between the United States and the Soviet Union in ongoing diplomatic efforts. *Id.* at 938-942. The court found over twenty instances in which these concerns had been expressed by the State Department, by the United States Mission to the United Nations, and by the United States Ambassador to the Soviet Union.

The district court concluded that the facts noted above "show a clear threat to this country's foreign relations," that "the electronic surveillances were

installed * * * under the constitutional authority of the President over the conduct of foreign relations and his inherent power to protect our national security," and that prior judicial authorization for the surveillances was thus not required by the Fourth Amendment. 363 F.Supp. at 944. Additionally, the district court held that respondents' statutory claim under Title III must fail because in *United States* v. *United States District Court*, 407 U.S. 297, 306 (1972), this Court held that "the Act simply did not legislate with respect to national security surveillances." 363 F. Supp. at 943.

2. The court of appeals, sitting en banc, reversed. 516 F.2d 594 (1975) (*"Zweibon I"*). The court held that prior judicial authorization was required by the Fourth Amendment for foreign security surveillances unless the target of the surveillance was himself an agent of, or a collaborator with, a foreign power.[3] *Id.* at 614 (plurality opinion); *id.* at 689 (Wilkey, J., concurring in part). A plurality of the court also held that *"the procedures and remedies of [Title III] were to completely occupy the wire tap-*

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[3] We do not seek review of this ruling because essentially the same result is now provided for by statute. See generally the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783. Indeed, under Section 104(a) of the Act, prior judicial authorization is now generally required even if the target of the surveillance is a foreign agent or collaborator. 92 Stat. 1788-1789. The President may, however, authorize such surveillance in limited circumstances without applying for a judicial order. Section 102(a) of the Act, 92 Stat. 1786-1787.

ping field except to the extent that the President's powers were rendered constitutionally immune from the warrant procedure of the Fourth Amendment" (*id.* at 666; emphasis in original) and that the remedies of Title III are therefore applicable to unconstitutional national security surveillances. The court concluded, however, that in determining the extent of the defendants' liability for authorizing and conducting a warrantless national security surveillance, the qualified immunity defense enunciated in *Wood* v. *Strickland*, 420 U.S. 308 (1975), as well as the good-faith defense provided under Title III itself (18 U.S.C. 2520), should be considered on remand. 516 F.2d at 670.[4]

3. After discovery was completed on remand, the district court granted petitioner's renewed motion for summary judgment.[5] Relying on this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 104 (1971), the district court held that the court of appeals' conclusion that a warrant was required by the Fourth Amendment in national security surveillances constituted a new principle of law that should

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[4] Respondents petitioned for a writ of certiorari to seek review of the holding in *Zweibon I* that the defendants may raise a good-faith qualified immunity defense under Title III. Petitioner then filed a conditional cross-petition, challenging the portions of *Zweibon I* adverse to him. The Court denied the petitions. 425 U.S. 944 (1976).

[5] Respondents agreed on remand to dismiss their claims against the nine FBI agents (App. C, *infra*, 25a n.1). Petitioner Mitchell is thus the only remaining defendant in this action.

not be applied retroactively to create personal damages liability (App. C, *infra*, 28a-35a). The district court noted that the lawfulness of warrantless national security surveillances consistently had been upheld by the lower courts prior to the decision of the court of appeals in *Zweibon I* and that the purpose of furthering the protections of the Fourth Amendment would not be advanced by retroactive creation of damages liability in these circumstances (*id.* at 30a-34a). The court also observed that creation of a private damages remedy for actions that were not recognized to be unlawful when done might constitute an unconstitutional ex post facto imposition of liability (*id.* at 34a). Finally, the court concluded that these same concerns barred respondents' claims for relief under Title III (*id.* at 35a-37a & n.5).

4. The court of appeals again reversed the district court's judgment (App. A, *infra*). The court of appeals held that the decisions in *United States* v. *United States District Court* and *Zweibon I* should be applied retroactively to establish a cause of action under the Fourth Amendment for warrantless national security surveillance of persons not agents or collaborators of foreign powers. The court held that the decisions did not announce a new principle of law but "simply applied the constitutional warrant requirement to national security situations" (App. A, *infra*, 12a). The court suggested that an Attorney General who chooses to rely on lower court decisions to guide his action does so at his own risk (*id.* at 12a-13a n.37, 18a n.49). Moreover, the court rea-

soned that, on balance, the equities favor retroactive application of newly-announced Fourth Amendment standards in damages action (*id.* at 17a-18a).

With regard to liability under Title III, however, the court of appeals recognized that its prior holding in *Zweibon I* that this statute applies to warrantless national security surveillances "represented the sort of sharp break in the law which should be restricted to prospective effect" (App. A, *infra*, 20a). But the court held that Title III liability might nonetheless be established in this case if, on remand, respondents can show that the surveillance was not primarily motivated by national security purposes but was instead motivated by the desire to obtain evidence for prosecutorial purposes (*id.* at 9a).[6]

The court of appeals refused to rule on petitioner's claims of absolute immunity and qualified immunity as a matter of law, which were briefed and argued as alternative bases to support the judgment of the district court (Appellee's Br. 50-68). The court of appeals noted that petitioner had raised these defenses in the district court (see 363 F. Supp. at 944) but that the district court had not yet had occasion to consider them (App. A, *infra*, 4a n.8).

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[6] The court of appeals remanded this issue for trial even though the district court previously had ruled that the search was plainly motivated by national security reasons (App. C, *infra*, 26a; 363 F. Supp. at 939-942). We do not seek review of this ruling of the court of appeals for the reason stated in note 8 of the petition for a writ of certiorari filed on this date in *Kissinger* v. *Halperin*.

REASONS FOR GRANTING THE PETITION

This case raises important and unsettled questions concerning the immunity of high-level Executive Branch officials from damages liability and the retroactivity of this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972). The identical questions are presented in our petition for a writ of certiorari in *Kissinger* v. *Halperin*, along with a complete statement of the reasons why these questions warrant this Court's review.[7] We therefore believe that the disposition of this petition should be deferred pending disposition of the petition in *Kissinger*.[8]

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[7] We are providing counsel for respondents with a copy of our petition in *Kissinger*.

[8] Although the court of appeals ostensibly refused to decide whether the Attorney General is immune from damages liability in the context of this case, its decision in *Kissinger*—which was decided on the same date—clearly forecloses the defense of absolute immunity or qualified immunity as a matter of law. Because these purely legal questions were expressly decided in *Kissinger*, it is preferable to review the issue in the context of that case.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of *Kissinger* v. *Halperin.*

Respectfully submitted.

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DECEMBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1348

BERTRAM ZWEIBON ET AL., APPELLANTS

v.

JOHN N. MITCHELL, Individually and as Attorney General of the United States, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 2025-71)

Argued February 9, 1979

Decided July 12, 1979

Before WRIGHT, *Chief Judge*, ROBINSON, *Circuit Judge*, and GESELL,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

WRIGHT, *Chief Judge:* Appellants, members of the Jewish Defense League (JDL), sued former Attorney

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* Of the United States District Court for the District of Columbia, sitting by desigination pursuant to 28 U.S.C. § 292(a) (1976).

General John N. Mitchell and nine agents of the Federal Bureau of Investigation (FBI) for damages for wiretapping of the JDL's New York office in 1970 and 1971. The District Court dismissed the case because it refused to apply retroactively the constitutional requirement of a warrant for national security wiretaps that was articulated in *United States* v. *United States District Court* (*Keith*), 407 U.S. 297 (1972), and in *Zweibon* v. *Mitchell* (*Zweibon I*), 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976). Similarly, the District Court limited to prospective effect the conclusion of the plurality in *Zweibon I* that some of the procedures and remedies of Title III of the Omnibus Crime Control and Safe Streets Act of 1968[1] are relevant to those national security surveillances that violate the Fourth Amendment. Since both holdings dispose of only part of appellants' complaint, however, there was no basis for dismissing the entire suit. Moreover, we decline to restrict the constitutional warrant requirement of *Keith* and *Zweibon I* to prospective effect in damage suits like this one. Finally, we affirm the District Court's ruling on the *Zweibon I* plurality's view of the statutory question.

The facts underlying this action are set out in detail in our opinion in *Zweibon I*, so we will note only the salient points here. In the late 1960s the JDL staged occasionally violent demonstrations against Soviet installations and personnel in New York to

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[1] Pub. L. No. 90-351, 82 STAT. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1976)).

protest the treatment of Jews in Russia. The JDL program drew complaints from the Soviets, along with thinly veiled threats of reprisal against Americans in the Soviet Union.[2] In addition, suspected and anticipated JDL actions constituted violations of several criminal statutes.[3] In October 1970, and between January and July 1971, the Government wiretapped six telephones at JDL headquarters.

The existence of the JDL wiretaps came to light in June 1971 during the trial of several JDL members on criminal charges,[4] and this suit for damages under the Fourth Amendment and Title III followed. The District Court granted summary judgment in favor of defendants on July 20, 1973,[5] but this court, acting *en banc*, reversed that ruling in *Zweibon I*. Drawing on the Supreme Court's decision in *Keith*, we found that the Government could not constitutionally place a wiretap on appellants' telephones without first ac-

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[2] *See* Joint Appendix (JA) 81-83, 88-89, 112-113, 148-149 (Department of State documents detailing Russian anger over JDL activities).

[3] *See* JA 68-69 (Sept. 14, 1970 memorandum from FBI Director J. Edgar Hoover citing "violence" and "injury to private citizens and law enforcement officers" from JDL activities and JDL threat to hijack airplanes); brief for respondents, Addendum at 3 (April 1971 State Department cable referring to Russian protest over alleged JDL bombing of Soviet office in New York).

[4] *See United States* v. *Bieber*, 71 C.R. 479 (E.D. N.Y.); *United States* v. *Joffee*, 71 C.R. 480 (E.D. N.Y.).

[5] *Zweibon* v. *Mitchell*, 363 F.Supp. 936 (D. D.C. 1973).

quiring a judicial warrant.[6] In September 1977 we also reversed the District Court's decision that the plaintiffs were not entitled to a jury trial.[7] The ruling we consider today came in response to renewed motions for summary judgment by appellees.[8]

II

The problem of determining the retroactive effect of a "new" judicial ruling goes to the heart of what courts do. Chief Justice Hughes described such decisions as "among the most difficult of those which have engaged the attention of the courts."[9] The traditional view is that decisions overruling prior holdings or announcing novel doctrine must be applied to all subsequent cases, even if the later cases involve incidents that took place before the crucial judicial ruling.[10] In such cases, according to Blackstone,

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[6] *Zweibon* v. *Mitchell* (*Zweibon I*), 516 F.2d 594, 611-654 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

[7] *In re Zweibon* (*Zweibon II*), 565 F.2d 742 (D.C. Cir. 1977) (*per curiam*).

[8] *Zweibon* v. *Mitchell*, 444 F.Supp. 1296 (D. D.C. 1978), Pending the Supreme Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), appellees did not advance in this action their earlier contention as to official immunity. Due to its decision on retroactivity, the District Court also did not reach appellees' "good faith" defense. *Zweibon* v. *Mitchell*, *supra*, 444 F.Supp. at 1298.

[9] *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940).

[10] *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.402, at 171 (2d ed. 1974). Justice Holmes stated the proposition quite strongly

"judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." [11] Thus for Blackstone judicial overruling reflects not the decision that the previous approach was "*bad law*, but that it was *not law*." [12]

For many years the Supreme Court only occasionally ignored the Blackstonian view of retroactivity by restricting reversal of earlier law to prospective effect.[13] In the 1960s, however, the Court established prospectively a number of constitutional rules protecting the rights of criminal defendants.[14] Prospec-

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in *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting): "In know of no authority in this court to say that in general * * * decisions shall make law only for the future. Judicial decisions have had retroactive operation for near a thousand years." *See also* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L. J. 907 (1962).

[11] 1 W. BLACKSTONE, COMMENTARIES *70 (Cooley's 4th ed. 1899).

[12] *Id.* (emphasis in original). A similar note with respect to unconstitutional legislation was struck by Justice Field in *Norton* v. *Shelby County*, 118 U.S. 425, 442 (1886); "[Such an] act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *See also United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). For a more modern explanation of the presumption in favor of retroactivity, *see* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142-143 (1921).

[13] *See, e.g., Douglass* v. *County of Pike*, 101 U.S. (11 Otto) 677, 687 (1879); *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

[14] *See, e.g., Linkletter* v. *Walker*, 381 U.S. 618 (1965) (prospective application of exclusionary rule of *Mapp* v. *Ohio*,

tive overruling can preserve the flexibility of judge-made law without causing unacceptable social upheaval, but the technique has two substantial drawbacks. First, it carries all the earmarks of legislative action with none of the democratic procedures.[15] Second, it is difficult as a logical proposition to maintain that a new doctrine should be established, yet that prior doctrine applies to cases reaching the courts after that decision so long as they involve events that occurred before that point. As Justice Harlan wrote:

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. * * *[16]

Historically, prospectivity has been less common in civil than in criminal cases.[17] This is at least partly

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367 U.S. 643 (1961)); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) (prospective application of rule of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), on presence of counsel at police interrogation); *Stovall* v. *Denno*, 388 U.S. 293 (1967) (prospective application of rule of *United States* v. *Wade*, 388 U.S. 218 (1967), on right to counsel at lineup).

[15] *See* Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L. J. 533, 536-537 (1977); Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60-62 (1965); Note, *supra* note 10, 71 YALE L. J. at 931-932.

[16] *Desist* v. *United States*, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

[17] *See Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 20 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972) (noting "almost no

due to the potential flood of *habeas corpus* petitions that looms if a court recognizes retroactively a procedural or substantive right of criminal defendants.[18] No such threat arises in civil litigation where a retroactive decision can affect only suits pending in the courts or not yet brought, but cannot be raised by previously unsuccessful litigants. The prospectivity determination in both civil and criminal cases, however, remains a pragmatic one that turns on the expected impact of a retroactive overruling on the

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suggestion" in criminal cases announcing prospective rules "that this line of authority should be applied to civil litigation").

The Supreme Court has permitted prospectivity in civil cases involving interpretations of law that might void municipal bonds, *e.g.*, *Gelpcke* v. *Dubuque*, 68 U.S. (1 Wall.) 175 (1863); *Douglass* v. *County of Pike*, *supra* note 13; *Taylor* v. *Ypsilanti*, 105 U.S. (15 Otto) 60 (1881); *Anderson* v. *Santa Anna*, 116 U.S. 356 (1886); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *City of Phoenix* v. *Kolodzeijski*, 399 U.S. 204 (1970); *see also Chicot County Drainage District* v. *Baxter State Bank*, *supra* note 9 (denying retroactive effect to prevent bondholders from voiding renegotiation of obligations), or that might generally work an undue burden on individual litigants, *e.g.*, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) (allowing tort suit to proceed despite intervening decision making different statute of limitations applicable); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) (first interpretation of federal voting statute); *England* v. *State Board of Medical Examiners*, 375 U.S. 411 (1964) (announcing rule that submission of federal claims to state court bars subsequent action in federal court, but not applying rule to appellants).

[18] *Cf. Desist* v. *United States*, *supra* note 16, 394 U.S. at 260-269.

society and legal system. Retroactivity is the rule, but not at the expense of other important values.[19]

Our disagreement with the District Court can be traced in part to the complexity of this suit. Appellants do not present one cause of action, but rather seek damages under both Title III and Fourth Amendment. And the constitutional basis for their suit involves both the warrant requirement of *Keith* and *Zweibon I* and the question whether the wiretap was reasonable even if no warrant was necessary. We think the retroactivity decision must be tailored to each particular cause of action. More important, we emphasize that the suit before us is not a criminal case, but a civil damage action alleging a constitutional tort. We must take care that in considering retroactivity we appreciate the context of our determination.

There can be no question of novelty, and hence no retroactivity problem, as to two features of this case. First, because the "reasonableness" requirement of the Fourth Amendment was recognized at the time of the wiretap as a controlling standard for national security surveillances,[20] the District Court should have applied that standard to the wiretap as initiated and as conducted for six months. Second, in *Zweibon I* we assumed without deciding that the surveillance

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[19] *See Chicot County Drainage District* v. *Baxter State Bank, supra* note 9, 308 U.S. at 374.

[20] *See Halperin* v. *Kissinger*, —— F.2d ——, —— (D.C. Cir. No. 77-2014, decided July 12, 1979) (slip op. at 16-17).

concerned national security matters,[21] and suggested that the District Court might inquire into this issue on remand.[22] Since then appellants have marshalled additional evidence suggesting that the primary motive behind the wiretap was criminal investigation, not national security.[23] If this proposition can be established at trial, the violation of the terms of Title III would be apparent, because appellees do not contend that they followed statutory procedures; and since the statute was enacted two years before the JDL surveillances, there would be no retroactivity question.[24]

III

With respect to the retroactivity of the Fourth Amendment warrant requirement announced by *Keith*

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[21] *See Zweibon I, supra* note 6, 516 F.2d at 612 n.39.

[22] *See id.* at 671 n.274: "[T]he trial court on remand will probably have to take additional testimony * * * in order to ascertain whether appellees in fact believed these wiretaps were being utilized to gather national security intelligence rather than to obtain evidence for criminal prosecutions * * *".

[23] Appellee Mitchell stated in a deposition that the Justice Department was concerned that the JDL would undertake assaults, bombings, and airplane hijackings, JA 232-233, and that the State Department was pressing his office for criminal prosecution of JDL members, JA 260, 261. In addition, the two FBI memoranda requesting wiretap authorization cite several suspected criminal violations. JA 68-71. Even without this evidence Judges McGowan and Robb concluded in *Zweibon I* that the surveillance should be viewed as part of a criminal investigation. 516 F.2d at 681-689.

[24] *See Halperin* v. *Kissinger, supra* note 20, —— F.2d at ——, slip op. at 23-24.

and *Zweibon I*, more extended analysis is required. In *Chevron Oil Co.* v. *Huson*[25] the Supreme Court offered a useful three-step test for prospectivity which was followed by the District Court in the case before us: (A) Did the court directly overrule precedent or announce a rule "not clearly foreshadowed"? (B) Is prospective application consistent with the "purpose and effect" of the rule? (C) Are there equitable considerations requiring prospective application? Because each of these considerations will have different effect in different cases, no single factor is controlling.

A

Appellants dispute the District Court's view that the application of the Fourth Amendment's warrant requirement to national security surveillances was "not clearly foreshadowed" by judicial decisions before these wiretaps were installed. Before *Keith* the Supreme Court had never ruled on the need under the Constitution for a warrant in national security surveillances,[26] but appellants urge that the trend of Supreme Court decisions was clear and that disagreement among the lower courts on this question could not justify the assumption that warrantless wiretapping was constitutional.[27] Moreover, appellants

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[25] 404 U.S. 97, 106-107 (1971).

[26] *See Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967).

[27] In an April 1971 speech, while the JDL wiretaps were still in place, appellee Mitchell commented on that division among the lower courts. JA 327-328.

point to a memorandum to appellee Mitchell from the Solicitor General in 1969 that noted the Supreme Court's "great hostility" to attempts to limit the rights of those "suspected of engaging in subversive activities," and counselled against a court test of Executive power to wiretap without a warrant.[28]

Since *Keith* and *Zweibon I* did not overrule any earlier decisions, we must determine whether application of the warrant requirement to national security cases was "not clearly foreshadowed." The Supreme Court has phrased this question in terms of whether a new rule represents the resolution of "complex issues of first impression" [29] or "an avulsive change which caused the current of the law thereafter to flow between new banks." [30] *Keith* and *Zweibon I* were cases of first impression, but the complexity and avulsiveness of their holdings on the Fourth Amendment's warrant requirement are not manifest. Statements by the Supreme Court in the late 1960s certainly demonstrated great concern over unrestrained warrantless wiretapping.[31] Extension of that concern to

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[28] JA 504-509.

[29] *Allen* v. *State Board of Elections*, *supra* note 17, 393 U.S. at 572.

[30] *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968).

[31] *See Alderman* v. *United States*, 394 U.S. 165 (1969); *Giordano* v. *United States*, 394 U.S. 310 (1969); *Taglianetti* v. *United States*, 394 U.S. 316 (1969); *Katz* v. *United States*, *supra* note 26; *Berger* v. *New York*, 388 U.S. 41 (1967).

the national security sphere was certainly likely, though perhaps not inevitable.[32]

We think the approach taken by the Seventh Circuit in *Dasho* v. *Susquehanna Corp.*[33] is appropriate here. That appeal challenged the trial court's refusal to permit a trial to the jury in a stockholder's derivative action. Then-Judge Stevens' opinion for the panel applied retroactively the Supreme Court's holding in *Ross* v. *Bernhard*[34] that stockholders have a right to a jury trial in such cases. Even though there had previously been a split among the circuits on that issue, the *Dasho* court concluded that *Ross* "did not establish a new principle of law," but "merely resolved a conflict in the circuits consistently with the Court's interpretation of prior law."[35] We believe that *Keith* and *Zweibon I* also did not announce a new principle of law, but simply applied the constitutional warrant requirement to national security situations.[36]

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[32] This seems especially true since in *Alderman* v. *United States, supra* note 31, the Supreme Court made no distinction in its application of the Fourth Amendment to defendants charged with conspiring to transmit murderous threats in interstate commerce, and to defendants alleged to have been engaged in espionage.

[33] *Supra* note 17.

[34] 396 U.S. 531 (1970).

[35] 461 F.2d at 21.

[36] Appellees' claimed reliance on prior Executive practice does not bear directly on our determination, since Executive actions cannot represent an authoritative source of constitutional standards. *Zweibon I, supra* note 6, 516 F.2d at 618-

As a result, we cannot say that the outcome in those cases was not clearly foreshadowed.

B

The second *Chevron Oil* standard focuses on whether retroactive overruling will promote or hinder the substantive rule announced in the crucial decision. Echoing the leading case on prospectivity of criminal rules, the District Court concluded that "[n]o amount of monetary damages can restore the privacy which was improperly invaded by the action of defendants * * *." [37] Accordingly, retroactive application of the warrant rule of *Keith* and *Zweibon I* in this case was not deemed to support the purpose of that rule. The court suggested that there might be a stronger basis for retroactive application of the warrant requirement in a criminal case where the exclusionary rule "constitutes a substantial and persuasive deterrent

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619. And as to appellees' reference to lower court opinions, we note Cardozo's candid reflection:

> We will not help out the man who has trusted to the judgment of some inferior court. In his case, the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty. * * *

B. CARDOZO, *supra* note 12, at 147-148 (footnote omitted).

[37] *Zweibon* v. *Mitchell*, *supra* note 8, 444 F.Supp. at 1300. *Compare Linkletter* v. *Walker*, *supra* note 14, 381 U.S. at 637 ("[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.").

of government activity which is questionably illegal." [38]

The District Court's overemphasis on criminal law concepts in rejecting retroactivity in this *civil* case has led it into error. The principle announced in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics* [39] is that monetary damages are an entirely appropriate remedy for Fourth Amendment violations. After *Bivens* the Fourth Amendment cannot be said to be restricted to procedural rights in a criminal prosecution or to civil injunctive proceedings. In this suit the terms of that constitutional provision, including the warrant requirement, function like any standards for conduct that might involve tort liability. Unlike the District Court, we think

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[38] *Zweibon* v. *Mitchell, supra* note 8, 444 F.Supp. at 1300. The District Court also claimed that retroactive application of the warrant requirement in a civil damage action would offend the policies behind official immunity doctrines. *Id.* We consider the District Court's concern on this score misplaced. The second *Chevron Oil* criterion focuses our attention on the purpose of the warrant requirement that is to be applied retroactively, not on the purpose of the immunity defense. Nevertheless, we disagree with the trial court's conclusion on the relationship between retroactivity and immunity doctrine. The availability of an immunity defense is unaffected by the outcome on the retroactivity issue, so we see no grounds for the fear that the purposes of the defense can be defeated by retroactive aplication of the warrant rule. Indeed, because immunity doctrine provides a defense for some individuals who might otherwise be held liable for acts undertaken before announcement of the warrant rule, *see* text at notes 48-49 *infra*, it supports retroactivity by preventing possibly unfair treatment of those defendants.

[39] 403 U.S. 388 (1971).

that a stronger case for prospectivity, rather than retroactivity, might be made in a criminal case involving the exclusionary rule, where the prophylactic purpose of that rule cannot be served by retroactive application and where the costs to society of retroactivity may be far greater.[40] In a damage action the effect of the warrant rule articulated in *Keith* and *Zweibon I* is to recognize a substantive right to compensation for injury.[41] Retroactive application would therefore seem fully consonant with those decisions and *Bivens*. That our ruling might have an incidental deterrent effect on official conduct in the future hardly establishes that retroactive application is improper because it will retard the effectiveness of the *Bivens* doctrine.[42]

But the analogy between this case and traditional tort doctrine may not be complete. Courts have indeed held tort defendants to a standard of conduct they could not have known before they performed

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[40] *See* text at note 17 *supra*.

[41] *See Bivens, supra* note 39, 403 U.S. at 397: "[P]etitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment." Thus the Supreme Court's refusal in *Desist* v. *United States, supra* note 16, to give retroactive effect to the warrant requirement for wiretapping in criminal prosecutions announced in *Katz* v. *United States, supra* note 26, flowed from the deterrent purpose behind the exclusionary rule of *Katz*. Retroactive application obviously does not enhance such deterrence. Accordingly, we do not think that *Desist* dictates our decision today.

[42] *See Dasho* v. *Susquehanna Corp., supra* note 17, 461 F.2d at 21.

the actions giving rise to liability.[43] The basis for such rulings, however, is the conviction that the standards for tort liability probably have little impact on actual conduct,[44] and that if a retroactive standard is reasonable, "the conduct of right-minded men would not have been different if the rule embodied in the decision had been announced by statute in advance." [45] The analogous proposition that Fourth Amendment rules have only a minor impact on conduct may not be apt, since the standards of the Fourth Amendment were considered, though perhaps incorrectly gauged, in establishing the Government's policy on national security wiretaps.[46] Moreover, a clear purpose of the Fourth Amendment is to affect official conduct.

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[43] A famous example is *Johnson* v. *Cadillac Motor Car Co.*, 221 F. 801 (2d Cir. 1915), where an automobile buyer sued the manufacturer for failing to inspect the car for defects. The Second Circuit ordered the District Court to dismiss the case, but before the lower court did so the New York Court of Appeals held for the first time that manufacturers did have a duty to inspect their cars for defects. *MacPherson* v. *Buick Motor Co.*, 111 N.E. 1050 (1916). The Second Circuit then reversed iteself and upheld plaintiff's claim in *Johnson* v. *Cadillac Motor Car Co.*, 261 F. 878 (2d Cir. 1919). *See Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) (dismissed suit for damages for disease contracted while employed by defendant is reinstated because Ohio Supreme Court subsequently recognized tort action for occupational diseases).

[44] *See* B. CARDOZO, *supra* note 12, at 145-146; Traynor, *supra* note 15, 28 HASTINGS L. J. at 545-546.

[45] B. CARDOZO, *supra* note 12, at 143.

[46] *See* JA 308-315 (Memorandum of May 6, 1969 to FBI Director from Attorney General).

Thus on this second *Chevron Oil* criterion we find that conflicting considerations yield no clear answer to the prospectivity question. As a standard of conduct to be applied in a civil tort suit, the warrant requirement is presumed to apply retroactivity. To the extent that the earlier standard, as understood, was the actual basis for the challenged surveillance, equitable concerns might be seen to require prospectivity only. Accordingly, we must explore the fairness of retroactivity in this situation.[47]

C

The central equitable concern in prospectivity decisions in damage actions is whether the defendants had notice of the new rule. If a truly new standard for liability has been promulgated, how can people be held to that rule for conduct preceding its announcement? In this case, however, where there was no "avulsive" change of law, the qualified immunity available to appellees ensures that no such inequitable result can occur. As we state today in *Halperin* v. *Kissinger*, Government officials sued for alleged violations of Title III or the Constitution in the performance of their official duties may offer as an affirmative defense (1) that they had reasonable grounds to believe their actions were legal, and (2)

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[47] *See Desist* v. *United States*, *supra* note 16, 394 U.S. at 251 (fairness considerations enter "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity").

that there is no evidence that they acted in bad faith.[48] The first ground clearly covers the fairness problems we might face with this case. By establishing immunity for actions reasonably thought to be legal, there can be no danger that a defendant will be held to a standard of conduct he could not have known, so long as there is no showing that he acted in bad faith. And if bad faith were demonstrated there would be little weight to any individual's equitable claim for restricting *Keith* and *Zweibon I* to prospective effect.[49]

Consequently, we refuse to bar application of the warrant requirement of *Keith* and *Zweibon I* to this case. To do so would deny appellants the opportunity to seek compensation for constitutional deprivations they may have suffered while providing only a redundant protection for appellees. In such a situation there is no basis for straying from the presumption that judicial decisions operate both prospectively and retroactively.[50]

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[48] *Halperin* v. *Kissinger*, *supra* note 20, —— F.2d at ——, slip op. at 33-37.

[49] Our rejection of the claim that *Keith* and *Zweibon I* should only be applied prospectively because they were not clearly foreshadowed, *see* text at notes 26-36 *supra*, should not be seen to undercut a claim of reasonable grounds for believing the legality of one's actions on the immunity issue. Contradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, but such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.

[50] In *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978), the Ninth Circuit refused to apply retroactively the warrant

IV

The District Court also denied retroactive effects to the conclusion of the plurality in *Zweibon I* that the "procedures and remedies" of Title III should apply to unconstitutional national security wiretaps.[51] We believe that the *Chevron Oil* standards support that ruling.

We think it is plain from the opinion of the *Zweibon I* plurality that its position on the statutory question was not clearly foreshadowed. The plurality noted that *Keith*, the closest precedent, "offers only ambiguous guidance" on the impact of Title III on unconstitutional national security surveillances, and acknowledged "some merit" in the District Court's view that *Keith* completely bars application of Title

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requirement of *Keith* after reviewing the *Chevron Oil* standards. Our disagreement with that court focuses on two points: (1) We do not think that the rule of *Keith* was not clearly foreshadowed, and (2) we believe that because qualified immunity protects potential defendants acting in good faith and in accordance with a reasonable understanding of applicable law, equitable considerations favor retroactivity to provide compensation for constitutional injury.

[51] *Zweibon* v. *Mitchell*, *supra* note 8, 444 F.Supp. at 1301. According to the *Zweibon I* plurality, national security surveillances that were subject to the Fourth Amendment's warrant requirement should also be held to Title III's procedures for acquiring a warrant, for judicial oversight of the surveillance, for record keeping, and for post-wiretap notification of surveillance targets, and the statute's civil remedy should be available in such instances. *Zweibon I*, *supra* note 6, 516 F.2d at 668-669.

III to national security wiretaps.[52] According to the plurality, the language of the statute and the legislative history are also "somewhat ambiguous" on this point.[53] In addition, there had been no judicial comment on the relationship between the Fourth Amendment's warrant requirement in national security situations and the provisions of Title III. The statutory issue was thus one of the first impression, and was quite complex, involving sophisticated analysis of *Keith* and of the legislative record.[54] The plurality's application of Title III to unconstitutional national security surveillance represented the sort of sharp break in the law which should be restricted to prospective effect.

In light of our conclusion in this case that the constitutional warrant requirement should have retroactive effect, the second and third *Chevron Oil* criteria support only prospective application of the position that Title III procedures and remedies are relevant to unconstitutional national security surveillances. Like the *Bivens* doctrine discussed above, the procedures and remedies of Title III have two dominant purposes: (1) to prevent or deter improper invasions of privacy, and (2) to provide compensation when such invasions occur. The deterrent purpose of Title III is necessarily forward-looking and hence not con-

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[52] *Zweibon I, supra* note 6, 516 F.2d at 600, 662.

[53] *Id.* at 671.

[54] *See Allen* v. *State Board of Elections, supra* note 17, 393 U.S. at 572.

tingent upon retroactive application. And so long as plaintiffs have the opportunity to seek redress under the *Bivens* line of cases, we will not frustrate the compensatory purpose of the statute by denying retroactive effect to the view of the *Zweibon I* plurality involved here.[55] Finally, the availability of the constitutional remedy dilutes any equitable claim of these plaintiffs on this point.[56]

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[55] This is particularly true of the procedural requirements of Title III. For the purposes of the retroactivity determination, we follow the *Zweibon I* plurality in considering together the procedural and remedial aspects of Title III. 516 F.2d at 664, 666, 669, 671. At one point the plurality does urge that "even if the *procedures* of Title III were inapplicable to national security wiretaps, the *remedies* of Title III should apply * * *." *Id.* at 664 (emphasis in original). This was not, however, the eventual position of the plurality, and we consider that statement as merely one step in the opinion's argument. To separate the procedural and remedial features of Title III in this context would be inconsistent with the plurality's view that "the procedures and remedies of the statute were to completely occupy the wiretapping field" as defined in "further judicial pronouncements * * *." *Id.* at 666 (emphasis deleted). We do not think Congress intended to provide in Title III a civil remedy for constitutional violations not subject to any other provisions of the statute.

[56] It might be argued that appellants here are entitled to the benefit of our decision in *Zweibon I* even if the rule announced is otherwise restricted to prospective application. This approach was followed by this court when it modified the standard for criminal insanity in *Durham* v. *United States*, 214 F.2d 862 (D.C. Cir. 1954), and by the Supreme Court in applying the exclusionary rule to the states in *Mapp* v. *Ohio*, *supra* note 14, and *Linkletter* v. *Walker*, *supra* note 14. *See Nga Li* v. *Yellow Cab Co.*, 532 P.2d 1226, 1244 (Cal.Sup.Ct. 1975) (overruling prospectively, with exception for plaintiff in that case, rule of contributory negligence). Two reasons for such

Accordingly, the judgment of the District Court is reversed on the retroactivity of the Fourth Amendment's warrant requirement and affirmed on the statutory question, and the case is remanded for further proceedings.[57]

So ordered.

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a course have been offered: (1) unless the new rule is applied to the case at hand it represents "mere *dictum*," and (2) unless litigants can expect the benefit of rules announced in their cases, they will lack incentive to bring suits challenging old rules. *Molitor* v. *Kaneland Community Unit District No. 302*, 163 N.E.2d 89, 97-98 (Ill.Sup.Ct. 1959). Critics insist, however, that a "purely" prospective overruling will be understood as more than dictum, while adequate incentives for litigation already exist, including the presumption of retroactive effect. Moreover, the "this-litigant" exception may impose a substantial burden on the defendant in such cases, a burden that no other similarly situated individuals must carry. *See* Traynor, *supra* note 15, 28 HASTINGS L. J. at 559-562; Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 215-216 (1965); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 490-91 (1962). Because our decisions in this litigation have granted these plaintiffs substantial opportunity to seek redress for injuries they may have suffered, there is no need for such an exception to our limitation to prospective effect of the *Zweibon I* plurality's position on the statutory question.

[57] We decline appellants' invitation to assign this case to a different judge on remand. We are confident that the District Judge will follow this court's rulings and will faithfully discharge his judicial obligations.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

Civil No. 2025-71

No. 78-1348

[Filed Jul. 12, 1979]

BERTRAM ZWEIBON, ET AL., APPELLANTS

v.

JOHN N. MITCHELL, Individually and as Attorney General of the United States, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WRIGHT, Chief Judge, ROBINSON, Circuit Judge, and GESELL,* District Judge

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed on the retroactivity of the Fourth Amendment's warrant requirement and affirmed on the statutory question, and the case is remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: July 12, 1979

Opinion for the Court filed by Chief Judge WRIGHT.

APPENDIX C

Civ. A. No. 2025-71

BERTRAM ZWEIBON ET AL., PLAINTIFFS,

v.

JOHN N. MITCHELL ET AL., DEFENDANTS

United States District Court
District of Columbia
Civil Division

Feb. 9, 1978

MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

This action is before the Court upon defendants' renewed motion for summary judgment. To facilitate an appreciation of the issues currently before this Court, we believe it appropriate to present the background of this litigation.

A. *History of this Action.*

This civil damage action constitutes a challenge to warrantless electronic surveillance of the offices of the Jewish Defense League (JDL) conducted by personnel of the Federal Bureau of Investigation [1] in October 1970 and from January 5 through July 3,

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[1] Plaintiffs have not opposed the dismissal as to these individuals, nine in number, originally named in the complaint.

1971, as authorized by then-Attorney General John N. Mitchell. Mr. Mitchell authorized the surveillances during a period of JDL harassment of personnel of the Soviet Union located in New York City, ostensibly in an effort to protect the ability of the President to conduct and maintain peaceful relations between the United States and the Soviet Union. Plaintiffs argue that the warrantless surveillances violated their statutory rights under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (hereinafter Title III) and under 42 U.S.C. §§ 1983 and 1985, and their constitutional rights under the Fourth Amendment.

This Court on July 20, 1973 dismissed the action, entering summary judgment for defendants and denying plaintiffs' cross-motion for partial summary judgment on the issue of liability. 363 F.Supp. 936 (D.D.C. 1973). We determined that the surveillance was conducted pursuant to the President's national security powers and therefore was not cognizable under Title III or under the Fourth Amendment. 363 F.Supp. at 942-44. Our holding was reversed by the United States Court of Appeals for the District of Columbia Circuit *en banc*, a majority concluding that the Fourth Amendment required a warrant and a plurality determining that Title III also mandated the issuance of a warrant in the circumstances presented in the subject case. *Zweibon* v. *Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). In its remand of the case to this Court,

the Court of Appeals directed our attention to defendants' interposition of three affirmative defenses to an assessment of liability: (1) whether the Court's determination that the wiretaps were illegally instituted should be applied to establish liability for activity antedating the Supreme Court's decision in *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (hereinafter *Keith*), if the determination in this case were based upon the *Keith* decision; (2) whether the doctrine of official immunity insulated these defendants from liability for these actions performed in their official capacities; and (3) whether damage relief should be denied because defendants acted in the good faith belief that their actions were lawful. 170 U.S.App.D.C. at 13, 516 F.2d at 607, n. 18.

Defendants have not advanced the second defense in their renewed motion for summary judgment, preferring to reserve this issue until the Supreme Court rules on the question of official immunity in a constitutional tort context in *Butz* v. *Economou*, 535 F.2d 688 (2d Cir. 1976), *cert. granted*, 429 U.S. 1089, 97 S.Ct. 1097, 51 L.Ed.2d 534 (1977). *See* Memorandum of Points and Authorities in Support of Defendants' Renewed Cross-Motion for Summary Judgment, at 27, n. 18. We therefore decline to consider and evaluate the immunity defense at this time.

The third defense, that of good faith, is likewise not reached by the Court at this time.[2]

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[2] The factual issues relating to the good faith defense are subject to a jury trial pursuant to the recent suggestion of

B. *Analysis.*

We therefore direct our attention to the issue of retroactive application of the *Keith* decision, framed by our Court of Appeals as follows:

> "If the illegality of these wiretaps is based upon the Supreme Court's decision in *Keith*, . . . there are strong factors which dictate that that decision should not be applied retroactively in this damage suit, which is based upon surveillance which occurred before the date of that decision."

170 U.S.App.D.C. at 13, 516 F.2d at 607, n. 18.

As a preliminary and necessary inquiry to our analysis of the retroactivity question, we note that the *en banc* Court of Appeals has found that "this case does indeed involve the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for future disposition." 170 U.S.App.D.C. at 58, 516 F.2d at 652. Although the Court recognized that *Zweibon* presented an issue which the *Keith* decision had reserved for future disposition, it relied upon the *Keith* rationale to conclude that a warrant should have been secured before these electronic surveillances were instituted. *Zweibon* v. *Mitchell, supra,* 170 U.S.App.D.C. at 58-59, 516 F.2d at 652-53.

(1) *Constitutional cause of action.* We therefore turn our attention to the criteria summarized and endorsed by the Supreme Court in *Chevron Oil* v. *Hu-*

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our Court of Appeals. *In re Bertram Zweibon,* 565 F.2d 742 (D.C. Cir. 1977).

son, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971), for determining whether the ruling of the Court of Appeals should be applied prospectively only or whether liability should be assessed in this action. The Court presented the following guidelines:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for 'where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " [citations and quotations omitted].

We have concluded that application of these criteria compels a determination that this decision should be applied prospectively only and that civil damage liability for the illegal electronic surveillance should not be assessed in this action. We analyze the *Chevron* criteria consecutively.

(a) New principle of law. First, we believe that the *Zweibon* decision established a new principle of law. The necessity of securing a warrant prior to the

institution of electronic surveillance of domestic organizations in situations where the national security is involved had not been judicially determined prior to its presentation in this litigation.[3] In *Katz* v. *United States*, 389 U.S. 347, 358, n. 23, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), while holding for the first time that the warrant requirement of the Fourth Amendment was applicable to electronic surveillances, specifically reserved the question of the applicability of the warrant requirements to national security surveillances. Undeniably, at the time these wiretaps were installed in 1970 and 1971, the question of their legality had not (and still has not) been adjudicated by the Supreme Court. Not until 1972 did the Supreme Court, in a matter of first impression, determine that the warrant requirements of the Fourth

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[3] Throughout this opinion we will refer to security surveillances pursuant to the following categorization: surveillances of domestic organizations impacting on purely domestic activities as "domestic security" surveillances; surveillances of domestic organizations which are independent of foreign influence but impact on the conduct of foreign affairs (the present factual situation) as "domestic national security" surveillances; and to surveillances of foreign organizations as "foreign national security" surveillances. "Foreign security" surveillances shall encompass the latter two categories. The Court of Appeals in treating this case as "foreign security surveillance" (170 U.S.App.D.C. at 19, 516 F.2d at 613, n. 42) has determined that a warrant must be obtained before a domestic national security wiretap is installed. *Zweibon* v. *Mitchell, supra,* 170 U.S.App.D.C. 20, 516 F.2d 514. We employ this terminology merely to facilitate discussion of the law as it has evolved through recent judicial decisions.

Amendment were applicable to domestic security surveillances. *Keith, supra,* 407 U.S. at 299, 92 S.Ct. 2125. Finally, in 1975, this case presented for the first time the question of the applicability of the warrant requirements for domestic national security surveillances. This is the first case to draw a distinction between the types of foreign security surveillances.

Furthermore, we conclude that the Court of Appeals' resolution of this controversy was not "clearly foreshadowed" at the time these surveillances were instituted over seven years ago. In fact, caselaw and historical precedent at that time indicated that a contrary resolution would be forthcoming from any court reviewing warrantless wiretaps in the national security—and particularly the foreign security—context. District courts had consistently held that a warrant was not required in such circumstances. *See United States* v. *O'Neal,* Cr. No. KC CR 1204 (D.Kan., Dec. 1, 1970); *United States* v. *Dellinger,* No. 69 CR 180 (N.D.Ill., Feb. 20, 1970). *See also United States* v. *Smith,* 321 F.Supp. 424, 429 (C.D. Cal.1971) (applicability of warrant requirement to foreign national security surveillances reserved, although warrant mandated for domestic security surveillances). In addition, warrantless national security electronic surveillances had been consistently conducted for more than 25 years by Attorneys General without judicial or Congressional intrusion. *See Keith, supra,* at 299. It is in recognition of these considerations that we reach our determination that

the facts of this case satisfy the first part of the *Chevron* test.[4]

(b) Purpose and effect of the rule. For our analysis of the remaining two factors of the *Chevron* retroactivity test, we rely heavily upon the well reasoned memorandum of Judge Gasch in *Sinclair* v. *Kleindienst*, No. 610-73 at 6 (D.D.C. Sept. 23, 1977), analyzing the question of retroactive application of *Zweibon* in the context of domestic security surveillances. We believe that the purposes of the Fourth Amendment will not be advanced by a retroactive application of the Court of Appeals' determination that a warrantless domestic national security electronic surveillance is unconstitutional. The effect of the Court's determination of unconstitutionality will be the protection of an individual's interest in privacy against warrantless domestic national security electronic surveillances. No amount of monetary damages can restore the privacy which was improperly invaded by the action of defendants in the subject conduct. Furthermore, plaintiffs have achieved the result

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[4] This conclusion is strongly supported by the determination by Judge Gasch that the illegality of warantless domestic security wiretaps was not "clearly foreshadowed" prior to *Keith*. *Sinclair* v. *Kleindienst*, No. 610-73 at 6 (D.D.C. Sept. 23, 1977). We believe that our controversy presents an even more compelling case for nonretroactivity than *Sinclair* since a domestic *national* security wiretap involves, to however limited a degree, the President's ability to conduct foreign relations, which is an essential ingredient to any exemption from the warrant requirement that potentially may emanate from our Court of Appeals. *See Zweibon* v. *Mitchell, supra*, 170 U.S.App.D.C. at 20, 516 F.2d at 614.

envisioned by the Fourth Amendment: the Department of Justice's electronic surveillance policy was revised following the Supreme Court decision in *Keith* and accommodated the directive of the *Zweibon* decision. *See* Statement of Attorney General Edward H. Levi, July 9, 1975 (Exhibit 8, Appendix to Defendants' Renewed Motion for Summary Judgment).

We are further persuaded by Judge Gasch's assessment in *Sinclair* that retroactive application of an illegality determination in criminal cases via the exclusionary rule might be appropriate in a given situation while a retroactive creation of a civil damage cause of action for the same privacy intrusion might be inappropriate. *Sinclair* v. *Kleindienst*, *supra*, at 6-7. *See Marks* v. *United States*, 430 U.S. 188, 196-97, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); *Morales* v. *Hamilton*, 391 F.Supp. 85 (D.Ariz.1975). Precluding usage of illegally secured evidence pursuant to the exclusionary rule in the very case in which the evidence has been deemed to be illegally procured constitutes a substantial and persuasive deterrent of government activity which is questionably illegal. We believe that the policies supporting the doctrines of official and sovereign immunity would be offended by retroactive creation of a civil damage cause of action which would subject public officials to personal liability for reasonable but erroneous interpretations in unsettled areas of constitutional law. *See Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.). In addition, the retroactive establishment of a cause of action to create liability for prior con-

duct under the facts of this case might very well violate defendants' constitutional rights under the Fifth Amendment and, in the matter of the statutory cause of action, could raise important problems implicit in the constitutional prohibition against *ex post facto* legislation. *U.S.Const.* Art. I, § 9, Cl. 3. *See Morales* v. *Hamilton, supra,* at 88.

(c) Equitable concerns. The third factor in the *Chevron* analysis is similarly satisfied here. We believe that the creation of personal liability for conduct consistent with the then prevailing statutory or constitutional norms and with long standing historical precedent is precisely the form of injustice or hardship which a holding of nonretroactivity could, and indeed should be implemented to, avoid. We reach this determination fully cognizant of, but unpersuaded by, plaintiffs' assertions that a nonretroactive application will frustrate honest and well-motivated litigation to redress constitutional wrongs. We have balanced the equitable interests presented and feel confident that the results of such balancing support our determination. This is not to be interpreted as a minimization of the privacy interest admittedly violated by the illegal actions of these defendants; the significance of the right invaded is not determinative in a retroactivity analysis. *See Cipriano* v. *City of Houma,* 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (determination of statute's unconstitutional deprivation of right to vote applied prospectively only).

We therefore find that, "insofar as the rules of law established in *Keith* and *Zweibon* are to serve

as the basis for civil liability, they should be limited to prospective application only." *Sinclair* v. *Kleindienst, supra,* at 7.

(2) *Statutory causes of action.* The foregoing analysis of the retroactivity question in the constitutional context similarly is dispositive of plaintiffs' claim for relief under Title III. Any alleged illegality of the electronic surveillances of 1970 and 1971 involved in this action under Title III must be founded upon the subsequent Supreme Court determination in 1972 in *Keith,* and upon the Court of Appeals' determination in 1975 in *Zweibon* that the warrant requirement of the Fourth Amendment was applicable to domestic national security surveillances.[5] *See Zweibon* v. *Mitchell, supra,* 170 U.S.App.D.C. at 77-78, 516 F.2d at 671-72 & n. 276 (applicability of Title III dependent upon future constitutional law determinations).

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[5] This disposition makes it unnecessary to determine the precedential significance of the plurality opinion of the *en banc* Court of Appeals that Title III applies to all electronic surveillances for which a search warrant is constitutionally required. Absent this expression by a plurality of the Court, we would adhere to our original conclusion of law that Congress, by Title III, did not attempt to legislate with respect to the national security powers of the President. 363 F.Supp. 942. *See* 18 U.S.C. § 2511(3) ("Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect [the national security]"); this conclusion is not without support. *Zweibon* v. *Mitchell, supra,* 170 U.S.App.D.C. at 98-99, 111, 516 F.2d at 692-93, 706 (opinions of Judge Wilkey and Judge MacKinnon, respectively); *United States* v. *Smith, supra,* at 425.

We therefore hold that plaintiff may not achieve the benefit of the statutory relief provisions of Title III.

We believe that a similar disposition of the claim as advanced under 42 U.S.C. §§ 1983 and 1985 is appropriate.

C. *Conclusion.*

For these reasons, we hold that plaintiffs are not entitled to the relief sought and that defendants' renewed motion for summary judgment should be granted. In view of our determination, it is not necessary to reach the separate affirmative defenses of good faith and official immunity.

An Order consistent with the foregoing has been entered this day.

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